



ISSN: 2788-8037

Publication details, including guidelines for submissions:
<https://rowaq.cihrs.org/submissions/?lang=en>

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Academic citation of this article: Saad, Ragab (2019) 'Views: Libya Unprepared for Peace, Crisis Exacerbated by Lack of Consensus while Constitution Remains in Limbo', *Rowaq Arabi* 24 (2), pp. 5-20.

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Views: Libya Unprepared for Peace, Crisis Exacerbated by Lack of Consensus while Constitution Remains in Limbo

Ragab Saad

In over eight years since its transitional phase began, Libya has become a state riven by political divisions and armed conflict, rather than a human rights-respecting, democratic state aligned with the goals of its 2011 revolution. Teeming with militias and violent extremist groups, human rights violations are endemic and committed with impunity, amid fragile state institutions incapable of upholding the rule of law. A consensus between the warring parties is requisite to achieving a comprehensive political resolution to end the suffering of Libyans, fatigued by conflict, insecurity, and instability; regrettably, the transitional period has lacked this direly-needed consensus. In meetings brokered by the international community, treaty after treaty is concluded then broken by the warring parties. Amid this acute political polarization and violence, the Constitutional Drafting Assembly (CDA) released a draft constitution in the summer of 2017; a constitution that neither respects human rights nor was put to popular referendum. With the international community beginning to abandon the concept of needing a constitution as a first or foundational step in the transitional process in favour of focusing on elections instead, the prospects of ending the Libyan nightmare were only further dimmed by the conflict erupting on April 4th.

In the wake of armed conflicts, civil wars, popular revolutions, and national independence, constitution-building is a vital process for states seeking to end armed conflict and become democracies. Promoting social peace- by addressing the past and holding those responsible for human rights violations to account, and by addressing the causes of political polarization – requires a restructuring of state political, judicial, and security institutions and the establishment of a new social contract strengthening democracy and protecting freedoms and human rights. Accordingly, constitution-writing and/or the enactment of constitutional amendments ending discrimination and combatting corruption, and ensuring the peaceful rotation of power is a vital political objective for states seeking to end conflict and become democracies wherein political actors resolve their conflicts non-violently through the ballot box in free and fair elections based on democratic rules.

The years following the end of the Cold War in 1989 were awash with constitution building processes, not only in East Europe but also in many states in South America, Africa, and Asia, following radical political shifts, some as a result of conflicts.¹ Despite the abundance of constitution building expertise and experience, no single constitutional formula will be viable in all divergent national contexts and circumstances; the particularity of which will shape the

constitution's final form. These unique contexts will determine important variables of the constitution-building process, such as: the selection-process of the constitutional drafters, (whether it be a constituent assembly, committee or group of experts); the independence of this group of constitutional drafters, the degree to which they are representative all segments of society, and their political and ideological biases. These divergent contexts also influence the constitutional drafters' commitment to the values of justice, democracy, and international human rights standards.

Constitution building is largely contingent upon the willingness of competing parties to negotiate a political settlement, maintain peace and the rule of law, hold human rights violators to account, and implement transitional justice measures. Other factors are important as well, such as foreign interference and local actors' engagement with it, economic conditions, and whether there are stark regional divisions in the country and demands for regional self-rule. Ethnic and minority groups potentially play a significant role in bargaining over rights and demands during the constitutional drafting process and peace negotiations, out of fear for majority disregard of their rights, and to avoid becoming marginalized as a permanent parliamentary minority.²

Peace negotiations are especially vital to constitution-building. An emphasis on achieving a peace agreement may come at the expense of other, no less important objectives, such as writing a good constitution endorsed across social constituencies. Such was the case in Bosnia and Herzegovina, as the spotlight on the 1995 Dayton Accords left constitution building in the shadows; in the push to achieve the peace agreement, insufficient attention was given to creating a genuinely democratic constitution that upholds citizenship rights and adheres to international human rights standards. These shortcomings were later addressed after the constitution's adoption.³

On the other hand, building a constitution before concluding a peace treaty may a practical impossibility. In this case an interim constitution, which establishes concrete objectives for the framers of the permanent constitution, may be used in the transitional phase, as was the case in Nepal. Similarly, a roadmap may navigate the constitutional writing process, as the Bonn Agreement of 2001 did for Afghanistan. Mozambique provides an inverse case study: a constitution was drafted by the government in 1990 with the goal of forcing the rebels to negotiate for peace.⁴

The question of identity – majority versus minority identities, the definition of identity and its impact on legislation and human rights- poses a significant challenge to the constitution building process. The striving of ethnic, racial, or religious minorities for recognition in the constitution (linguistic, symbolic, historical), is potentially faced with resistance from the majority, who may fear the formal integration of minority identities into the overall identity of the nation and its citizenry.

Likewise, questions of identity may fuel conflict during the constitutional writing process. In Iraq, after the US invasion and the fall of Saddam Hussein's regime, discussions over the Iraqi constitution spurred a debate about identity issues, including the role of religion in the constitution, which in turn alarmed advocates of human rights and individual liberties.⁵ Similar debates about

religion, state, and identity have occurred recently in other Arab states such as Egypt, Tunisia, and Libya during their constitution building processes, as we will discuss further.

In addition, holding elections before a constitution is written—meaning before various parties agree on the rules and framework for elections, the rotation of power, and the prerogatives of elected bodies—potentially has grave consequences for the status of democracy, rights, and liberties in the constitution. The elections may produce a parliamentary majority hostile to the international human rights system and democratic values. This in turn will influence the formation of the constitution-writing assembly and result in the intentional exclusion of weaker political and social forces.

Constitution Writing in the Context of the Arab Spring

In the wake of the Arab Spring uprisings, the public sphere was very rapidly split between the forces of political Islam and the so-called civil forces. A debate raged over the identity of the state (religious or civil?), the status of Islamic law (shari‘a) in the constitution, and the stance on public and private freedoms. In 2011, Tunisia, Libya, and Egypt entered transitional phases accompanied by confusion, muddling, insecurity, and economic deterioration; with the pace of constitution writing and holding elections varying in each state. Each state’s constitution differed in the extent to which it respected democratic values, equality, human rights, and the declared objectives of the revolutions, as well as the extent to which it complied with the constitution after its adoption.

After Egypt’s revolution of 25 January 2011, a debate ensued among revolutionary forces and liberal, leftist, and Islamist parties over whether the constitution or parliamentary elections should come first. The referendum of 19 March 2011 resolved this dispute in favour of the latter. Political Islamist groups subsequently won a parliamentary majority and dominated the formation of the constituent assembly. In 2012, that assembly wrote a skewed constitution hostile to democracy and showing little regard for liberties and human rights.⁶

The 2012 constitution was suspended after the armed forces assumed power in Egypt upon the ouster of President Mohammed Morsi and the Muslim Brotherhood in the summer of 2013; and a new assembly formed to write another constitution. Although rights and liberties in the 2014 constitution fared better than in the 2012 document, the subsequent constitution nevertheless contained loopholes allowing for restriction and erosion of rights and liberties.⁷ Even the guarantees inscribed in 2014 constitution were not honoured or respected, with government of President Abdel Fattah el-Sisi flouting Egypt’s international human rights obligations as well as its constitutional guarantees.⁸ In 2019, amendments were introduced to extend the term of the current president, in contravention of the constitution.⁹

The political polarization in Tunisia was less acute than in Egypt. The Islamist Ennahda movement, which had a majority in the constituent assembly, pragmatically stated in the constitution that Tunisia is a free country, the language of which is Arabic and religion Islam; and did not insist on including a provision declaring Islamic law to be the reference for legislation.

Under pressure from civil society and other political forces, it also ceded demands for strict provisions related to blasphemy and women's rights.¹⁰

Even so, the transitional phase in Tunisia was not smooth, marred by political violence and a serious political crisis resulting from the assassination of two secular political leaders. Mediation by four Tunisian civil society organizations overcame the crisis and contributed to the draft constitution's approval in January 2014, clearly demonstrating the significant role played by civil society in Tunisia's transition. In addition, the Ennahda leadership was influenced by the Muslim Brotherhood's downfall in Egypt; making it more amenable to the civil society initiative, and to adhering to a roadmap stipulating the resignation of the Ennahda government as part of the political settlement.

Post-Revolution Constitution Building in the Libyan Context

The long history of constitutionalism in Egypt and civil society's assumption of leadership in Tunisia contrasted starkly with Libya's very limited constitutional experience (a brief experiment discarded by the Gaddafi regime, which ruled without a constitution) and its lack of freedom to form civil society organizations and political parties. Both Egypt and Tunisia had established political movements and parties with varying capacities for mobilization and organization, particularly the Muslim Brotherhood in Egypt and Ennahda in Tunisia; while in Libya, for decades there was no freedom to form political parties or civil society organizations, and there had never been a presidential election. Libyans entered the post-Gaddafi phase without the constitutional, political, and rights legacies of other Arab Spring states or their organizational resources. In addition, ongoing armed conflicts and severe political divisions have influenced the now years-long debate over the constitution.

A Libyan constituent assembly was formed during the independence era in October 1950, with sixty members, twenty representing each of the three main regions: Barqa in the east, Tripoli in the west, and Fezzan in the south. The constitution was adopted in October 1951, nearly two months before Libya's declaration of independence on 24 December 1951. A major amendment was introduced in 1963 annulling the federation between the three regions and appointing King Idris al-Senussi the king of a united Libya. In 1969, Colonel Muammar al-Gaddafi staged a coup ousting the king and initiating a new authoritarian regime amenable to violence and hostile to political pluralism. Party and political activity was criminalized, and the military coup suspended the 1951 constitution, but saw no need for a new constitution. Gaddafi preferred to rule without one, establishing the 'jamahiriya' order that he expounded on in his Green Book. In that book of quasi-political theory, Gaddafi claimed that the jamahiriya system would enable the people to rule themselves via popular congresses without a constitutional framework or even an assembly of elected representatives.

Before the Libyan popular revolution erupted on 17 February 2011 against the Gaddafi regime, demands for a constitution were heard from the political and judicial elite.¹¹ Gaddafi engaged with these demands as part of his attempt to contain their impact on the citizenry amidst the wave of

optimism that swept the region after the Tunisian and Egyptian revolutions brought down President Zein el-Abidine Ben Ali and President Hosni Mubarak respectively.¹² In this context, it was natural that a constitution would be one of the major demands of political and rights groups from the first days of the revolution.

On 3 August 2011, the internationally recognized National Transitional Council (NTC), which had assumed administration of the country, issued the first constitutional declaration, even before all of Libyan territory was liberated. Some observers believed that the August declaration allowed for the country's constitutional legacy to be disregarded during the constitutional debate following the revolution.¹³ Some Libyans believe that the NTC should have resurrected the 1951 constitution, suspended by Gaddafi forty-two years earlier, arguing that the natural constitutional trajectory would have been to build on the independence era constitution of 1951.¹⁴

To draft a permanent constitution, the constitutional declaration provided for the formation of the Constitutional Drafting Assembly (CDA), appointed by the legislative authority established at that time, the General National Congress (GNC). But just days before the election of the GNC, the NTC amended the declaration to make the CDA an elected body, rather than one selected by the congress.¹⁵ Some saw this as an erosion of the GNC's prerogatives.¹⁶ The amended declaration stipulated that the CDA's decisions would be adopted by a majority of two-thirds plus one vote and also extended the deadline for writing the constitution to 120 days, or four months, from the date of the assembly's first meeting. In July 2012, the 200-member GNC was elected, and in August, the NTC ceded power to the congress.¹⁷ The largest plurality in the parliament with 39 seats was a coalition of national forces known as part of Libya's liberal current, led by former Prime Minister Mahmoud Jibril. The Islamist Justice and Construction Party won 17 seats while the National Front took three seats.¹⁸

Political Divisions, Legal and Constitutional Quagmires

On 20 July 2013, the GNC issued Law 17/2003 on the election of the CDA.¹⁹ The law provided for a sixty-member assembly, with twenty members representing each of the major geographic regions: Barqa in the east, Tripoli in the west, and Fezzan in the south. Members would be elected by a simple majority vote via direct, secret ballot in an election of individual candidates; the candidate with the most votes would win the seat and ties would be broken by drawing lots. The law designated six seats for women, or only 10 percent of the assembly. The law also required representation for special Libyan cultural and linguistic constituencies, meaning the Amazigh, the Tebu, and the Tuareg. Some believe that the law failed to ensure proper representation for all social constituencies, particularly cultural and linguistic minorities. The Supreme Amazigh Council announced its rejection of the law and boycotted the election, nominating no one for the two seats designated for Amazigh.

With time, the political divisions deepened. Violent extremist groups emerged to exploit the political and security vacuum left in the wake of the state's collapse in 2011 and committed crimes and grave human rights abuses. The conflict in Libya took a dramatic turn in February 2014, when

former General Khalifa Haftar demanded that the army assume control pending new elections. Some three months later, on 16 May 2014, Haftar announced the commencement of a military operation dubbed 'Libya's Dignity' in the city of Benghazi, with the goal of eradicating what he called extremist control of the state and saving the country from anarchy, and he sought to suspend the operation of the elected legislature.

Haftar received the support of eastern tribes and former military personnel angry about the 2013 Political Isolation Law and the assassination of several senior officers. On the other side, the GNC accused Haftar of attempting to restore the old regime and bury the revolution and the forces representing it. In response to Operation Dignity, in July 2014 Islamist forces and groups launched Operation Libya Dawn and managed to take the capital of Tripoli in the west. The forces declared the elected House of Representatives illegitimate and called on the GNC, whose term had now ended, to resume operations and form a government. The House moved to Tobruk in the east, thus establishing two competing governments in the east and west.

In this turbulent political climate, the CDA was supposed to carry on with its work, discussing a new constitution for Libya that would meet Libyans' hopes for the realization of the revolution's goals, including a democratic transition and robust respect for human rights. The CDA worked for some three years, during which it released several versions before the adoption of the final draft in July 2017. No single political group or ideology clearly dominated the assembly. The majority of members were non-political and did not belong to political groupings. Disputes arose between the members of the assembly and its president, some of them resolved in court, concerning the meetings of the assembly outside Libya or the legal quorum required to approve provisions in the constitution. The judiciary also ruled to dismiss the head of the assembly because of his US citizenship. Despite claims of non-bias and non-affiliation with parties to the conflict, some assembly members believe that the CDA's decisions were influenced by the shift in the dominant political and military forces in some regions.²⁰

The parties to the Libyan conflict reached a political agreement in late 2015 that gave the CDA until 24 March 2016 to complete a constitutional draft. If no agreed-upon draft constitution could be completed, a small committee would be formed of five representatives each from the House of Representatives and the State Council, with the participation of the Cabinet during proceedings to ensure a resolution. Nevertheless, the CDA could not complete a draft constitution by the deadline. After a marathon session, a final draft was released on 29 July 2017, approved by a vote of forty-three members of the assembly.²¹

Given the political divisions and ongoing, multilateral military conflicts, the writing and adoption of the constitution was encumbered by procedural and legal obstacles that were not overcome by the release of the final version. Some two weeks later, the Bayda Appeals Court ruled to cancel the draft constitution's referral to the House of Representatives.²² Another six months later, on 14 February 2018, the Libyan Supreme Court overturned the appellate court ruling.

A new obstacle appeared soon enough, however, originating from the law governing the constitutional referendum. Under the seventh amendment to the constitutional declaration, within thirty days of the CDA's completion or release of the draft constitution, it is to be put to a yes/no

referendum.²³ If Libyans approve the draft by a two-thirds majority, the CDA ratifies the vote and it becomes the country's constitution, to be referred to the House of Representatives for promulgation.

If the constitutional draft is not approved, the document is returned to the assembly to be rewritten and put to another referendum within thirty days of the first referendum's announced results. The problem was that the House of Representatives had not obtained the legal quorum necessary to approve the law within the stipulated time. Some accused House Speaker Aguila Saleh of intentionally delaying the vote on the law and thereby delaying the referendum after his failed attempts to dissolve the CDA, 'fearing that the constitutional roadmap and elections would sideline him.'²⁴

The House of Representatives finally issued the referendum law in September 2018, but fundamental amendments were introduced in November 2018 that affected the conditions for the referendum. In the tenth constitutional declaration, the House of Representatives adopted the historical three-region system (Barqa, Tripoli, and Fezzan) for the constitutional referendum. The constitution would be approved by a two-thirds majority of all voters, provided that each of the three districts approved it by 50 percent plus one vote. This condition could impede the passage of the constitution if it were not win the required support in any of the three districts. The condition also contravenes the constitutional declaration, which stipulated a two-thirds majority vote all over Libya.

Disarray in the International Community and Recalcitrant Libyan Parties

As the CDA was on the verge of completing the draft constitution in late July 2017, France hosted talks between Fayez al-Sarraj, the prime minister of the national unity government or Government of National Accord (GNA), and Libyan National Army (LNA) commander Khalifa Haftar, mediated by the French president. Al-Sarraj and Haftar agreed to a ceasefire and presidential and parliamentary elections at the earliest possible date, with no mention of the need for a democratic constitutional framework establishing the rules of the electoral system, guaranteeing its fairness, and defining the prerogatives of the president and legislature. Neither party proved able to implement the agreement. The fate of the political settlement, the end of the transitional period, and a resolution of the legitimacy crisis in Libya remained uncertain.

In the meantime, the international community observed the continued security instability and political division in Libya with mounting fear, concerned about the potential threat to its neighbours as well as the waves of irregular migration across the Mediterranean. In September 2017, UN Special Envoy Ghassan Salamé announced a multistage UN plan to end the prolonged transition in Libya, which included changes to the political agreement followed by a national conference that would bring together the different parties with the goal of reaching an agreement. The plan expected the House of Representatives to prioritize laws for the constitutional referendum and presidential and parliamentary elections, and it gave the CDA the opportunity to review the

constitution and edit it based on observations and proposals that would be received at the conference.

Salamé set a deadline of one year to implement the plan.²⁵ The Libya Quartet (UN, African Union, EU, and the Arab League) approved Salamé's plan in a meeting in New York.²⁶ Al-Sarraj was in agreement with the vision of the UN mission and he attempted to persuade Haftar to back the plan in the Cairo meeting, but the military commander proved to be an obstacle, declaring that he did not recognize the elections conducted by the National Elections Committee in Tripoli. Demonstrators came out in Benghazi in support of Haftar, demanding that he be appointed president without elections.²⁷

Several factors favoured the plan's potential implementation, including the international community's desire to end the Libyan crisis, and Libyans' exasperation with the prolonged transition period and their fear of continued chaos. Nevertheless, the deadline passed with neither a political settlement, a constitutional referendum, nor elections. As part of the UN mission's desire to convene a Libyan dialogue on ending the transitional phase, it backed the consultation process of the Libyan National Conference, which had resulted in various proposals from Libyan citizens on how to address the constitutional and electoral deadlock.²⁸

Nevertheless, the UN mission failed to convince the political factions of the necessity of reaching a political consensus and implementing it in concrete, calculated steps. Libyan parties and institutions lacked the necessary political will to end the transitional phase, and individual interests took precedence over the interests of Libya and its people. Libyan parties had also become accustomed to meeting in joint discussions that ended with promises and agreements that were not honoured, whether it be to hold a referendum or hold parliamentary and presidential elections, in order to end the seemingly endless transition.

The four main Libyan actors—Fayez al-Sarraj, the head of the Government of National Accord (GNA); military commander Khalifa Haftar, head of the Libyan National Army (LNA); House Speaker Aguila Saleh; and Khalid al-Mishri, the head of the Tripoli-based State Council—met in Paris in May 2018 with the French president and UN envoy Ghassan Salamé and agreed to a political declaration on Libya, known as the Paris Agreement. The declaration provided for a common agreement setting “the constitutional basis for elections and to adopt electoral laws by Sept. 16 with a view to holding legislative and presidential elections on Dec. 10.”²⁹

The participating parties drafted a timetable that lacked, in addition to realistic expectations, any concrete strategy to end the state of lawlessness and address the existence of numerous armed factions that could impede the referendum and election process. Rights groups also warned that the Paris Agreement would be rendered meaningless by continued security sector fragmentation and ongoing impunity for crimes committed by all parties.³⁰ And, in fact, the Paris Agreement failed to bring about the referendum and elections by the deadline.

Before 2018 came to a close, Salamé announced that the Libyan National Conference would meet in the early weeks of 2019 to organize elections for the first quarter of the year. Salamé believed that elections could be held, even absent a constitutional referendum, based on an

understanding among Libyans ‘on other constitutional rules [that may be found] in the constitutional declaration or another place in order to hold fully transparent elections.’³¹

The conference did not convene as Salamé promised, neither tangible steps were implemented to hold elections in the first quarter of 2019 or at a later date, nor did political actors reach an understanding on a referendum date or a constitutional basis for elections in the near future. Nevertheless, on 28 February 2019, the UN mission announced a meeting in Abu Dhabi between al-Sarraj and Haftar, sponsored by Salamé, which concluded with an agreement to end the transitional phase with general elections. No concrete details were given to the Libyan people to assure them that this ‘agreement,’ unlike previous ones, was serious and backed by the political will to carry it out.

On 4 April, shortly after the Abu Dhabi agreement, Haftar surprised everyone by ordering his troops to advance on Tripoli, declaring it his objective to purge the capital of militias and end terrorism. As Haftar’s forces began advancing, UN Secretary-General António Guterres was in Tripoli preparing for the national reconciliation conference in mid-April, in which Haftar was scheduled to participate.³² According to reports, Haftar’s forces were backed by some Arab states and Western capitals, and some outlets reported that he had received military support from several allies.³³

Al-Sarraj issued an arrest warrant for Haftar and condemned the international community’s silence on the national army’s advance on the capital. In particular, he accused France of backing Haftar. Militias supporting al-Sarraj’s government pledged to defend Tripoli. After more than a month passed without Haftar taking the capital, the French presidency issued a statement on 8 May calling for an unconditional ceasefire. On 13 May, after hundreds were killed, over 2,000 people wounded, and more than 55,000 people displaced, the EU issued a statement calling Haftar’s offensive against Tripoli ‘a threat to international security and peace.’³⁴

The potential for a ceasefire remains uncertain; and even if a ceasefire is concluded and Haftar’s forces retreat to their locations as of 4 April, it is absurd for international parties to believe the situation will simply return to the status quo ante of the Abu Dhabi agreement. There is no choice but to stake out a new negotiating trajectory and seek a political resolution based on the new conditions currently prevailing in Libya.

Rights and Liberties in the Draft Constitution

Since 4 April 2019, amidst the battles underway near Tripoli, there has been no space for a serious discussion of taking the CDA’s draft constitution to the ballot box. Yet certainly after a peace agreement is reached, Libyans will seek to write a constitution for the country. It will then be useful to evaluate the CDA’s experience and consider that draft. The crisis of the Libyan constitution is not only a matter of political divisions and conflicts or a matter of the international community’s failure to help the Libyan people end the transitional period, now culminating its eighth year with no discernible end in sight. There are also grave concerns about the status of rights and liberties in the assembly’s draft constitution, in particular the status of Islamic law and its

impact on human rights and freedoms, citizenship rights and women's rights, constitutional guarantees for the protection of rights and liberties, and minority rights.

Islamic law, shari'a, has been prominent in political and revolutionary discourse from the beginning of Libya's revolution.³⁵ It took several years for the CDA to agree upon the status of shari'a in the constitution, and the provision on shari'a was subject to continuous changes and debate.³⁶ In the draft constitution released in April 2016, Article 8 was amended to read, 'Islam is the state religion, and shari'a is the source of legislation in accordance with the religiously recognized schools and interpretations, although no particular juridical opinion is binding in interpretive matters. The provisions of the constitution shall be interpreted based on this.'

The formulation is vague about the meaning of 'the recognized schools and interpretations,' and how such schools and interpretations, with which the legislature must comply, are to be defined and who will define them. There was an attempt to add a provision stipulating the formation of a supreme fatwa committee. An amended version of Article 8 appeared in the final draft of 2017 as Article 6, which states, 'Islam is the state religion, and shari'a is the source of legislation.' The final version also included a provision precluding any future amendments to this article.³⁷ It seems that similar debates about the status of Islamic law in the constitution, as seen in Egypt in particular, influenced debates within the Libyan CDA, which was unable to disengage from the traditional climate in the region when it comes to thought about religion in the constitution and legislation; and appeared willing to sacrifice human rights to appease the dominant strain of religious thought in society.

The Libyan legal environment and social conventions do not provide guarantees for women's rights. On the contrary, women face discrimination and diminished rights to equality. In this framework, there has been a prolonged discussion of women's rights in the constitution.³⁸ The April 2016 draft required the state to issue legislation guaranteeing protection for women, increasing their status in society, banning discrimination against them, and eliminating social customs that infringe upon their dignity. It also recognized women's right to pass their Libyan citizenship on to their children, although it left it to the law to regulate this right, which threatened this gain.³⁹ The final draft dropped all references to this right.

In its chapter on transitional measures, the 2016 text included an article to ensure representation for women in the House of Representatives and local councils, requiring the legislature to designate 25 percent of seats in the House and local councils to women for 12 years following the adoption of the constitution, or three electoral terms. In contrast, Article 185 of the final draft requires representation for women in the House and local councils for only two electoral terms. Some observers attributed this retreat to the poor representation of women in the CDA itself.⁴⁰

Article 13 of the draft constitution states that international treaties and agreements ratified by Libya take precedence over ordinary law but are subordinate to the constitution; and it requires the state to implement this provision in a way that does not contravene other constitutional provisions. Positioning international treaties and conventions on a higher legal rung than ordinary law opens the door to changes in the Libyan legislative framework that could bring it more in line with international human rights standards. It could also allow human rights defenders to challenge the

constitutionality of laws that contravene the international human rights system. However, the fact that the constitution takes precedence over such conventions and that its provisions cannot be superseded will render Article 6 (which, as we recall, establishes Islam as the state religion and shari'a as the source of legislation) an obstacle to bringing legislation in line with the international human rights system.

The phrase 'in accordance with the provisions of the constitution' is the Trojan horse of the Libyan draft constitution. It not only restricts the full application of international conventions, but it could also be used to circumscribe citizenship rights and open the door to discrimination between citizens in an article that ostensibly provides for citizens' equality. Article 7 of the draft prohibits discrimination between citizens for any reason, in accordance with the provisions of the constitution. This again raises the spectre of Article 6, which could be invoked to prevent Libyans from exercising their full rights of citizenship.

The draft constitution does not guarantee equal rights for citizens and does not seek to strengthen citizenship rights. In addition to the foregoing, Article 69 requires candidates for the House of Representatives to be Libyan Muslims, while Article 76 establishes the same condition for the Senate. Article 99 requires presidential candidates to be 'Muslim Libyan with two Muslim parents.' Also worthy of note here is that the chapter on rights and freedoms contains no article on the protection of freedom of religion and belief.

Article 34 compels the state to protect human dignity, prevent violence, and combat torture, cruel, degrading, and inhuman treatment, and enforced disappearance, but it is silent about punishment for persons responsible for torture or enforced disappearance, and it does not require the state to compensate victims.

Article 41 establishes a constitutional basis for the protection of freedom of association and the freedom to form and join associations, barring the suspension or dissolution of civil society organizations except through the courts. Article 42 grants civil society organizations the right to submit draft legislation, but leaves it to the law to regulate the procedures for civil society participation in the legislative process.

Article 43 protects the right of peaceful assembly and demonstration, but it permits the use of force 'in case of necessity,' a vague formulation that could give the security forces the right to interpret 'necessity' and use force against peaceful demonstrators in a public square.

Article 159 provides for the establishment of the National Council on Human Rights, tasked with cementing the human rights values and public liberties found in Islamic law and international conventions. It gives the council the right to recommend ratification of international human rights conventions, provided they do not contravene the provisions of the constitution. The article does not provide for the council's independence and an autonomous budget that would make it independent of the central authority. The provision also fails to provide for the inclusion of human rights defenders on the council, which contravenes the Paris Principles on the formation of national human rights bodies.

In the chapter on transitional provisions, the draft constitution requires the state to implement transitional justice, issue a law for the disclosure of truth, provide compensation and

accountability, and vet institutions. It also provides for the creation of a transitional justice body to oversee the implementation of a transitional justice program as part of a comprehensive national reconciliation.

Minorities Rebel against the Draft Constitution

Article 2 of the draft constitution states, ‘The languages spoken by Libyans or some of them, among them Arabic, Amazigh, Tuareg, and Tebu, are a cultural and linguistic heritage and a common reservoir belonging to all Libyans.’ It defines Arabic as the state language, but requires the issuance of a law regulating the inclusion of Libyan languages in public life and on the state level. This formulation recognizes the various cultural components of the Libyan people. Article 195 on procedures for amending the constitution also protects Article 2 from any future amendment.

Nevertheless, this article was unable to resolve the debate in Libya on the rights of the primary minorities (the Tebu, Amazigh, and Tuareg), a debate that began very early, as the law on the CDA was being drafted. Two seats on the assembly were designated for each of the three minorities, which did not satisfy the minority communities. A promise was made to amend the constitutional declaration to require the assembly to come to a consensus with the minority communities on issues related to them, but it was not honoured.

In a joint statement on 17 July 2013, the three minority communities announced that they would boycott the CDA election, neither running candidates nor voting in it, and they threatened civil disobedience. Under continued pressure, the GNC amended the seventh constitutional declaration in March 2015 to require the CDA to make its decisions by a two-thirds plus one majority vote and to reach a consensus with special cultural and linguistic Libyan communities on provisions related to them. A follow-up election was held in which Tuareg and Tebu participated, while the Amazigh continued to boycott, seeking to stipulate a need for agreement on particular issues.

The CDA debated the meaning of ‘consensus,’ but it ended without tangible results. Disputes then arose within the assembly over minority representation on the working committee, which resulted in the Tebu and Tuareg representatives boycotting the assembly in June 2015. In January 2016, the minority communities formed a coordinating committee to reject any draft constitution that was not issued with the consensus of the minorities. The UN mediated negotiations between the Tebu, Tuareg, and the CDA in Salalah, Oman, which ended with the Tebu rejecting the assembly’s proposal and the Tuareg accepting them.

Minority resistance to the draft constitution is attributed, by some observers, to the assembly’s lack of political will in regards to reducing the substantial disparities in representation, resource distribution, and power sharing between minorities and the rest of the population. As such, minority communities sought to ensure their full rights in the constitution, fearing they would otherwise be left to the whims of the parliamentary majority in the future.

Parliamentary representation is primary concern for minorities. While the draft constitution guarantees ‘a minimum threshold of representation for cultural and linguistic constituencies’ in

the article on membership in the House, it does not stipulate the minimum as it does with women's representation.⁴¹ In addition, the draft suspends naturalization procedures for ten years from the date the constitution enters into force, although Tebu residents of the Aouzou region, who were stripped of citizenship in the Gaddafi era, are facing a crisis now.⁴²

Conclusion

For years, Libya has suffered from a lack of consensus among parties to the conflict. Elites have lacked the political will to end the armed conflict while political divisions are further deepened by regional conflicts; with militias and factions receiving financial support and weapons from various states in the region. While the international community has looked on apprehensively at the presence of violent extremist groups in Libya's expansive geographic territory and along its coastline, which is a launching point for irregular migration north, it has failed to manage the peace and transitional phase in the years following the fall of the Gaddafi regime. Although the UN envoy's plan provided for a referendum on the constitution prior to elections, the constitution seems to have fallen out of consideration in the wake of setbacks to the UN plan and the failure of the Paris Agreement. The goal now is to organize elections, as if by doing can alone save Libya from the maelstrom of anarchy and violence.

After eight years of suffering and chaos, and enormous casualties, it is disheartening to say the least that Libyans currently find themselves with no viable options and the revolution's goals beyond reach. Libyan politicians are mostly to blame for this bleak state of affairs, before the international and regional parties involved in the crisis. Libyan leaders have repeatedly partaken in internationally sponsored meetings, during which they pledge to end the conflict; yet not only do they then fail to take any tangible steps to do so, but instead, they actively nurture conflict and deepen divisions. Haftar's latest assault on Tripoli has put an end to the current negotiating track; putting peace even further out of reach.

The CDA should not have proceeded with drafting a constitution amidst Libya's political polarization, armed conflict, chaos, bloodshed, and violence. The lack of consensus is not only a feature of the relationship between the political elite and militia leaders; it was also a primary cause of the crises within the assembly, which ultimately delivered a draft constitution that does not meet the revolution's demands for a robust democracy and respect for human rights, and a celebration of the diversity of the Libyan people.

A constitution alone is certainly not the solution to the Libyan conflict. Nevertheless, Libyans need to assess the arrangements of the transitional phase, including the method for forming the CDA and drafting the constitution, in order to avoid repeating mistakes when forming a new body representative of all Libyans. Even before the constitution, a resolution of Libya's crisis requires a consensus for the future, peace, and stability of Libya. If the main actors lack the political will to reach this consensus without squandering additional opportunities and time, the transitional phase, which Libyans long to see end, will persist.

About the Author

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This article is originally written in Arabic for Rowaq Arabi

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² For further detail, see Anderson, George and Sujit Choudhry (2015) 'Constitutional Transitions and Territorial Cleavages' (International Institute for Democracy and Electoral Assistance).

³ Sarajlic-Maglic, Denisa (2014) 'Constitutional Reform in Bosnia and Herzegovina', in Alvaro Vasconcelos and Gerald Stang (eds.) *Constitutional Reform in Times of Transition* (Arab Reform Initiative).

⁴ Winluck Wahiu (2011) *A Practical Guide to Constitution Building* (International Institute for Democracy and Electoral Assistance).

⁵ Gordon, Eleana and Omran Salman (2005) 'Hal Yaftah al-Dustur al-'Iraqi al-Bab amam Tatbiq al-Shari'a al-Islamiya' [Does the Iraqi Constitution Open the Door to the Application of Islamic Law], *Awraq Dimuqratiya* 6.

⁶ For further detail, see Saad, Ragab Taha (2012) 'Huquq al-Insan taht Matraquat Dustur al-Islamiyin', *Rowaq Arabi* 63 (Cairo Institute for Human Rights Studies).

⁷ Cairo Institute for Human Rights Studies (2014) 'Mata Tahza Misr bi-Dustur Yahtarim al-Misriyin wa Yasun Karamatahum?' [When Will Egypt Get a Constitution that Respects Egyptians and Protects Their Dignity?], 12 January.

⁸ For further detail, see reports issued by Amnesty International, Human Rights Watch, and independent Egyptian human rights groups about the state of human rights in Egypt from 2014 to 2018.

⁹ Joint statement from Egyptian rights organizations (2019) 'Misr: al-Ta'dilat al-Dusturiya al-Muqtaraha Tuhaddid al-Istiqrar wa Tamnah al-Ra'is al-Hukm Mada al-Hayah' [Egypt: The Proposed Constitutional Amendments Threaten Stability and Grant the President Rule for Life], 12 February.

¹⁰ Marks, Monica (2014) 'Convince, Coerce, or Compromise? Ennahda's Approach to Tunisia's Constitution' (Brookings Doha Center Publications).

¹¹ In 1993 Gaddafi raised the idea of drafting a constitution, but took no serious measures to follow through. His son, Seif al-Islam Gaddafi, who considered himself his father's successor, called for a constitution in his speech to the first forum of the National Organization of Libyan Youth in Sirte in August 2006. While the younger Gaddafi stressed that a new constitution would not affect his father's position, the call for a constitution nevertheless remained part of the younger politician's propaganda. No serious steps were taken to follow through despite rumors that Seif al-Islam had almost completed a draft of the constitution.

¹² Gaddafi attempted to contain the political ferment in Libya in early 2011, meeting a number of prominent figures, including a delegation from the Lawyers Syndicate, which stressed the need for a constitution that would protect rights and liberties and establish a constitutional framework for legislation. Gaddafi engaged with the delegation's proposal during the meeting, but he was not serious about political reform or meeting citizens' demands. The meeting was designed to test the waters and mollify political activists and rights defenders, whose influence on the citizenry the regime feared.

¹³ Lanqi, al-Zahra' (2018) 'Tajahul al-Mawruth al-Dusturi fi Libya' [Disregard of the Constitutional Legacy in Libya], *al-Safir al-Arabi*, 26 April.

¹⁴ Ahdash, Mohammed Ali (2011) 'Taqwim al-Hala al-Dusturiya fi Libya' [Arab Center for Research and Policy Studies, 25 September.

¹⁵ The amendment provided for the formation of the constituent assembly 'by a free, direct vote of non-members to draft a permanent constitution for the country, to be known as the constituent assembly. It shall be composed of sixty members, following the Committee of Sixty formed to draft the constitution of Libya's independence in 1951. The GNC shall determine the election criteria and rules while showing due regard for the need for representation for

distinct cultural and linguistic constituencies in Libyan society. See Constitutional Amendment no. 3/2012, <https://security-legislation.ly/ar/node/31468>.

¹⁶ Madbouli, Ashraf (2012) ‘Ta’dil al-I’lan al-Dusturi fi Libya “Intiqas min Salahiyat al-Barlaman”’, BBC Arabic, 7 July. http://www.bbc.com/arabic/middleeast/2012/07/120707_libya_constitutional_declaration.

¹⁷ ‘al-Majlis al-Intiqali fi Libya Yusallim al-Sulta li-l-Mu’tamar al-Watani al-‘Amm’, <http://ara.reuters.com/article/topNews/idARACAE87800A20120809>.

¹⁸ Carter Center (2012) *al-Mu’tamar al-Watani al-‘Amm: al-Intikhabat fi Libya, al-Taqrir al-Niha’i*, July, https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/libya-070712-final-rpt-arabic.pdf.

¹⁹ The text of Law 17/2003 can be found at <http://constitutionnet.org/vl/item/lyby-qnwn-rqm-17-lsn-2013-hwl-ntkhb-hyy-ltsysy-lsyg-mshrw-ldstwr-lmwtmr-lwtny-lm-2013>.

²⁰ For further detail on the constitutional process in Libya after the revolution, see Saad, Ragab (2017) ‘al-Tariq ila-l-Dustur fi Libya’ [The Road to the Constitution in Libya], in Ahmed Fawzi (ed.) *al-Dustur wa Huquq al-Insan fi Buldan al-Thawrat al-‘Arabiya (Tunis, Misr, wa Libya) Namudhajan* [The Constitution and Human Rights in the Countries of the Arab Revolution: The Case of Tunisia, Egypt, and Libya], Democratic Transition and Human Rights Support Center.

²¹ Saad, Ragab (2017) ‘A Constitution That Doesn’t Protect Rights and Freedoms: Libya Writes Its Constitution’, Atlantic Council, 3 August, <https://www.atlanticcouncil.org/blogs/menasource/a-constitution-that-doesn-t-protect-rights-and-freedoms-libya-writes-its-constitution>.

²² ‘Mahkamat Isti’naf al-Bayda’ Taqbal al-Ta’n fi Muswaddat Mashru‘ al-Dustur’ [The Bayda Appeals Court Accepts the Appeal of the Draft Constitution], Africa News Portal, 16 August 2017.

²³ Constitutional Amendment no. 7/2014, <https://security-legislation.ly/ar/node/31981>.

²⁴ Toaldo, Mattia (2017) ‘A Constitutional Panacea for Libya?’ Sada, Carnegie Endowment for International Peace, 22 August.

²⁵ Speech of the UN special envoy Ghassan Salamé in a high level meeting on Libya, 20 September 2017.

²⁶ Joint statement of the Quartet meeting on Libya, 23 September 2017.

²⁷ Al-Warafli, Ayman (2017) ‘Haftar Yaqu Innahu Sayastami’ il “Awamir al-Sha‘b al-Libi al-Hurr”’ [Haftar Says He Will Listen to the Orders of the Free Libyan People], Reuters, 17 September.

²⁸ UN Support Mission in Libya (2018) *The Libyan National Conference Process: Final Report*, November, https://unsmil.unmissions.org/sites/default/files/ncp_report_jan_2019_en.pdf.

²⁹ Irish, John and Marine Penetier (2018) ‘Libyan Factions Agree to Dec. 10 Elections at Paris Talks’, Reuters, 29 May.

³⁰ Cairo Institute for Human Rights Studies (2018) *Peace and Democratic Transition in Libya: A Dream Deferred or an Everlasting Nightmare?* June.

³¹ UN Support Mission in Libya (2019) ‘Ghassan Salama: Ana Musta’jil ‘ala-l-Intikhabat Akthar min al-Libiyin Anfusihim’ [Ghassan Salamé: I Am More Anxious about Elections Than Libyans Themselves], 22 January.

³² Laessing, Ulf (2019) ‘How Libya’s Haftar Blindsided World Powers with Advance on Tripoli’, Reuters, 10 April.

³³ Nichols, Michelle (2019) ‘U.N. Report Finds Likely Use of Armed Drone in Libya by Haftar or “Third Party”’, Reuters, 9 May.

³⁴ France 24 (2019) ‘al-Ittihad al-Urubi Ya’tabir Hujum Quwat Haftar ‘ala Tarabulus “Tahdidan li-l-Amn wa-l-Silm al-Dawliyin”’ [EU Considers Attack on Tripoli by Haftar’s Forces ‘Threat to International Security and Peace’], 13 May.

³⁵ During the celebration for liberation on 23 October 2011, Judge Mustafa Abdul Jalil, the president of the NTC, began his speech by prostrating in prayer on the ground in the celebration square before announcing, ‘Any law that contravenes shari‘a is hereby immediately suspended’. The constitutional declaration of 2011 stipulated that Islam is the state religion and shari‘a the primary source of legislation. In December 2013, the Libyan parliament tried to preempt the formation of the CDA by announcing that ‘Shari‘a is the sole source of legislation in Libya. Any legislation that contravenes its provisions is void, and all state institutions are bound by this’.

³⁶ The first thematic committee in the CDA submitted a proposal for the chapter on the form of the state and its basic components which gave Islamic law a status that would pave the way to the establishment of a theocracy and enshrine hostility to human rights, citizenship rights, and democracy. The proposed text took a hostile view of doctrines that contravened shari‘a, which in turn was not clearly defined, even among the CDA members themselves.

It also established a constitutional basis for hostility to freedom of religion, conscience, expression, and creativity. The proposal can be found on the CDA’s official website at http://www.cdalibya.org/assets/files/9_1_1419437993.pdf.

³⁷ Saad, Ragab (2017) 'A Constitution That Doesn't Protect Rights and Freedoms: Libya Writes Its Constitution'.

³⁸ For more details see Saad, Ragab (2017) 'al-Tariq ila-l-Dustur fi Libya' [The Road to the Constitution in Libya].

³⁹ Law 24/2010 on the provisions of Libyan citizenship sets broad restrictions on Libyan women's right to pass on Libyan citizenship to their children with foreign fathers, which erodes their right to equality and full citizenship rights. The text of the law can be found at <http://security-legislation.ly/ar/node/33060>.

⁴⁰ Saad, Ragab (2017) 'A Constitution That Doesn't Protect Rights and Freedoms: Libya Writes Its Constitution'.

⁴¹ For further detail see Wahli, Khaled (2018) 'al-Aqalliyat fi-l-Dustur al-Libi: al-Tubu Namudhajan', periodical of the Center for Democratic Transition and Human Rights Support no. 1, June.

⁴² Van Waas, Laura (2016) 'Adimu Jinsiya fi Libya: Halat al-Tubu' [The Stateless in Libya: the Case of the Tebu], al-Mufakira al-Qanuniya, 13 January.